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CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1490

FEDERAL POWER COMMISSION, *Petitioner*

v.

TEXACO INC., ET AL.

No. 72-1491

DUDLEY T. DOUGHERTY, ET AL., Co-Executors of the Estate of Mrs. James R. Dougherty, Et Al., *Petitioners*

v.

TEXACO INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. pp. 1a-22a) [1] is reported at 474 F.2d 416. The initial order (No. 428) of the Federal Power Commission (Pet. App. pp. 29a-46a), its order (No. 428-A) of amend-

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[1] "Pet. App." refers to the appendices to the petition in No. 72-1490.

ment (Pet. App. pp. 47a-49a), and its order (No. 428-B) denying rehearing (Pet. App. pp. 50a-84a) are reported at 45 FPC 454, 45 FPC 548, and 46 FPC 47, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1972 (Pet. App. pp. 23a-25a). Petitioners' petitions for rehearing were denied on February 5, 1973 (Pet. App. pp. 26a-28a). The petitions for a writ of certiorari were filed on May 3, 1973 and were granted on October 9, 1973 (J.A. 254).[2] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Natural Gas Act vests authority in the Federal Power Commission to exempt small producers from the just and reasonable rate requirements provided in Sections 4 and 5 of the Act and to attempt to close the resulting regulatory gap indirectly through review of the prices charged by such small producers as costs to the pipeline purchasers in proceedings involving the rates of such pipelines.[3]

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[2] "J.A." refers to the separate appendix printed for the proceeding before this Court.

[3] In its formulation of the Question Presented, the Commission seeks to leave the impression that its actions here involved were principally procedural in nature by stating the question in terms of an exemption from "certain [undescribed] filing requirements under the Natural Gas Act * * *" (Comm. Br. p. 2). There is no question, however, that the Commission actions are substantive and undertake to relieve the small producers *per se* from direct rate regulation under the Act (See Comm. Br. pp. 7, 27).

STATUTE INVOLVED

The pertinent provisions of Sections 1(b), 4, 5 and 16 of the Natural Gas Act, 15 U.S.C. 717(b), 717c, 717d, and 717o are set forth in the Appendix, *infra,* pp. 1a-3a.

STATEMENT OF FACTS

By Notice of Proposed Rulemaking issued July 23, 1970, the Federal Power Commission proposed "prospectively to exempt from regulation under the Natural Gas Act all existing and all future jurisdictional sales made by small producers", *i.e.* producers whose total jurisdictional sales do not exceed ten million Mcf of natural gas annually (J.A. 1-13). Following the submission of written comments by various affected producers, pipelines,[4] distributors and State Commissions (J.A. 97-134) and the holding of an informal conference (J.A. 135-154), the Commission promulgated its Order No. 428 here involved (J.A. 135-154).

By this Order which is captioned "Exemption of Small Producers from Regulation" (J.A. 135), the Commission provided for the issuance of blanket certificates to small producers under which they would thereafter be exempt generally from the rate, certificate and certain filing requirements provided in the Natural Gas Act and the Commission's regulations thereunder (J.A. 147-149).[5] Under such certificates

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[4] Respondent, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee) filed comments as an affected pipeline company.

[5] Except for the filing of an abbreviated annual report setting forth their total annual volume of jurisdictional sales (J. A. 143-144, 151), and for compliance with the abandonment provisions of Section 7(b) of the Act (J. A. 144, 149).

small producers would *inter alia* be "authorized to make small producer sales nationwide pursuant to existing and future contracts *at the price specified in each such contract"* (J.A. 149).[6] In addition, they would be relieved of the obligation to make refunds with regard to any excessive rates (J.A. 142, 143).[7]

In its Order, the Commission observed that the Natural Gas Act did not require it to regulate all jurisdictional sales of natural gas and left room for the exercise of administrative judgment and discretion such as were involved in its proposed small producer exemption (J.A. 136). Further, it asserted that exempting small producers from the Act's requirements constituted an important step in its discharge of its responsibilities of assuring an adequate gas supply for the interstate markets (J.A. 137).

> "Our purpose in taking action here is not to increase contract prices, but to facilitate the entry of the small producer into the interstate market and to stimulate competition among producers to sell gas in interstate commerce. We seek to assure the small producer that when he enters into a new contract for the interstate sale of gas, the provisions of his contract will not be subject to change. We also want to relieve the small producer of the expenses and burdens relating to regulatory matters. Our action should also ease the administra-

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[6] Emphasis supplied throughout unless otherwise indicated.

[7] In addition to small producer rates no longer being limited by the area rates generally applicable to jurisdictional sales of gas, the Commission ruled that although it had previously held certain types of escalation clauses to be inoperative as contrary to the public interest, it would permit such clauses to operate to permit small producer rates to increase *up to* the applicable area or guideline rates (J.A. 138).

tive burdens connected with processing small producer filings."

The proposed exemption for the small producers, the Commission went on, "does not constitute deregulation of sales by small producers. We will continue to regulate such sales but will do so at the pipeline level by reviewing the purchased gas costs of each pipeline with regard to small producer sales" (J.A. 138). Adoption of such indirect regulation, the Commission claimed, came within its "ample authority to inquire * * * into the reasonableness of all items of operating expense, including the cost of purchased gas, and to disallow items of cost which are imprudent." (J.A. 139).[8]

Thus, as a substitute for its direct regulation of the rates for small producer sales to pipelines and large producers, the Commission proposed that resales of such gas by the pipelines and large producers

> "* * * be subject to reduction and refund, with respect * * * to that part of the rate which is unreasonably high considering appropriate comparisons with highest contract prices for sales by large

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[8] The indirect regulation thus proposed in Order No. 428 apparently constitutes the basis for the assertion in the Commission's Brief(at p. 6):

> "In that order [Order No. 428] the Commission did not exempt small producer sales from all regulation, but rather adopted a form of regulation which it deemed appropriate in the circumstances."

In this connection, it should be noted that the provision for such indirect regulation was added in Order No. 428 without the required notice in the Notice for Proposed Rulemaking in violation of Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 553(b). The Court of Appeals did not reach this question in light of the broad grounds for its invalidation of Order No. 428.

producers or the prevailing market price for intrastate sales in the same producing area. Tracking increases to the extent they reflect small producer prices for new sales above the standard set forth above may be suspended, and if so, will be collected subject to reduction and refund. The issue will be resolved either in (1) a pipeline rate case or (2) a proceeding involving only the tracking increase.[9] Pipelines must state the grounds for claiming that the rate at which gas is purchased from a small producer is required by the present or future public convenience and necessity. * * * In this manner the market mechanism in the light of regulation of pipeline rates will be protective of consumer interests." (J.A. 142) [10]

On appeal by several affected large producers and pipelines, including Tennessee, the Court of Appeals held that Congress had made the statutory just and reasonable rate standard applicable to all wholesale sales of natural gas in interstate commerce, and had not vested any authority in the Commission to exempt any such sales from direct Commission regulation (Pet. App. 7a-10a). Further, the Court below pointed out that the so-called indirect control of small producer prices through regulation of the costs of large pro-

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[9] Purchasers from small producers were permitted to file tracking increases

> "only if the small producer rate increases, or such increases together with other increases authorized for tracking by applicable Commission rules or orders, affect the pipeline's average cost of purchased gas by one mill or more." (J.A. 143)

[10] By Order No. 428-A the Commission prescribed the form of annual statement to be filed. See J. A. 159-161. By Order No. 428-B, the Commission denied the applications for rehearing filed, *inter alia*, by Tennessee and reaffirmed its basic rulings in Order No. 428 after eliminating some of the retroactivity contained in that Order (J. A. 238-253).

ducers and pipelines was not a complete substitute since the purchased gas costs to be passed on by such purchasers were to be measured not by the statutory just and reasonable standard but by whether the prices paid by these purchasers were

> "unreasonably high, considering appropriate comparisons with ***highest contract prices*** for sales by large producers *or* the prevailing market price for *intrastate* sales in the same producing areas" (Pet. App. 11a). (Emphasis in original)

Continuing, the Court below noted (Pet. App. 12a-13a):

> "* * * At best, the indirect controls [the Commission] has proposed will insure that the small producer rates which are passed on to consumers are below levels set by private contracting parties (or potentially by state regulation which is not necessarily tied to the federal standard). Nothing at all insures that those levels will be 'just' or 'reasonable'. That is the essential flaw in the Commission's plan. That is the point at which the FPC abdicates its regulatory responsibility in derogation of the purposes and mandatory terms of the statute. Indirect 'regulation' by such novel 'standards' is worse than an exemption simpliciter. Such an approach retains the false illusion that a government agency is keeping watch over rates, pursuant to the statute's mandate, when it is in fact doing no such thing."

With regard to the argument that "while the Commission would no longer be regulating rates, the *market mechanism* itself would in effect dictate small producer prices which were just and reasonable" (Pet. App. p. 13a) (Emphasis in original), the Court below ruled (Pet. App. p. 14a):

> "* * * such a post hoc rationalization does not coincide with the Commission's own view of its

Order. The FPC flatly concedes that '[t]he Commission's order does not purport to determine the just and reasonable rates for sales by small producers.' (footnote omitted) To the contrary, the Commission's basic contention all along has been that the 'just and reasonable' standard was not mandatory and that the FPC can simply choose not to regulate rates. (footnote omitted) It strains credulity to assert that the Commission meant to achieve just and reasonable rates through normal market forces, while in the very same Orders it refused to let pipelines and large producer plant operators pass on these 'just and reasonable' rates without further review under new non-statutory standards. Since the Commission itself has not been confident enough to conclude that the market will necessarily yield rates that comply with the statute, this court can hardly uphold the Orders on that ground."

Further accepting the validity of "the Commission's motives [and] its opinion that some form of deregulation of small producers might benefit the consumers of natural gas" (Pet. App. 5a), the Court of Appeals pointed to the recent cases in which it had approved various Commission experiments designed to alleviate the gas shortage (Pet. App. 7a).[11] However, it held that it could not approve the Commission action here since that action went beyond the limits on the Commission's authority (Pet. App. 7a). In this regard, the Court below further commented (Pet. App. 16a):

"* * * we cannot hold that *non*regulation is the statutory equivalent of regulation. Only Congress can knowingly prescribe nonregulation for small

[11] *Public Service Commission* v. *F.P.C.*, 467 F.2d 361 (D. C. Cir. 1972); *Public Service Commission* v. *F.P.C.*, — F.2d — (Nos. 71-1197 *et al.*, decided May 16, 1972).

producers in lieu of the existing statutory scheme of regulation found by the Supreme Court in *Phillips* to be mandatory under the Natural Gas Act for all producers." (Emphasis in original).[12]

In his dissent, Judge Fahy agreed that "all rates and charges of any natural-gas company * * * which includes the small producers * * * shall be just and reasonable and if not, that they are unlawful." (Pet. App. 18a). Further observing that the Commission had authority to classify small producers separately (Pet. App. 19a), he took the position that

> "the Commission had [not] abdicated its responsibility to insure that rates of small producers will be just and reasonable. It does not appear from the record before us that any such price that might be charged is reasonably unjust or unreasonable. * * * Moreover, consumer protection is promised and I cannot now hold that the promise will not be fulfilled" (Pet. App. 21a).

Accordingly, while he would have affirmed Order No. 428 generally on the theory that it would not "lead inevitably to unjust or unreasonable rates charged by small producers" (Pet. App. 19a), he nevertheless

> "* * * would strike its provisions prohibiting refunds to pipelines and large producers, leaving

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[12] In so holding, the Court also noted (Pet. App. 16a):

> "All of this is not to say that a proper regulatory determination, within the letter and spirit of the Natural Gas Act, could not set a just and reasonable rate for small producers higher than that for large producers. Given the special problems and practices of small producers, such a result is certainly conceivable. But the small producers cannot be exempted from the regulatory scheme, and have their prices tied to the free market, by administrative agency fiat."

open to the Commission to exercise such authority as it has to protect large producers and pipelines in the event the Commission finds they have been charged unreasonably high prices by small producers. * * * Should such a modification temper to a degree the charges of small producers, I think that result must be accepted as required by the public interest represented by the Act. I do not think such possible tempering would go so far as to defeat the purposes of Order No. 428." (Pet. App. 22a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Basic to the Commission's position before this Court is the thesis that the Court below misinterpreted the "Commission plan" in connection with small producers. According to the Commission (Br., p. 13), the Court below erred in holding that "Order No. 428 would permit small producers to sell natural gas at rates that may be 'unjust' and 'unreasonable' in violation of Sections 4 and 5 of the Natural Gas Act * * *" To the contrary, the Commission now claims that "it [did] not abandon the 'just and reasonable standards of Sections 4 and 5; rather it establishes an innovative method of indirect regulation which assures that * * * small producers' rates meet the statutory standard * * *." (Comm. Br., p. 13).

This Commission position suffers from a basic fallacy, which permeates its entire brief, stemming from an improper amalgamation of the two entirely separate and distinct facets of the transaction which together make up the sale of gas. One is the sale of gas by the small producer, and the other is the purchase of that gas by the pipeline with the Natural Gas Act imposing direct rate regulation on the sale facet of the transaction. Viewed in light of this dichotomy, it is apparent, as we show in Part I below, that since Order

No. 428 operates to permit the small producers to charge the contractually-permitted prices whatever they may be and without reference to the Act's just and reasonable rate standard, permitting these producers to receive and retain such unregulated prices clearly serves, contrary to the Commission's argument, to abandon the direct Commission rate regulation prescribed by the Act with respect to such producer sales. As the Court below held, such "nonregulation" by the Commission violates the Congressional mandate embodied in the Act.

The Commission deemphasizes and indeed borders on denying that Order No. 428 has such an effect. Instead, it prefers to focus upon the so-called "indirect regulation" provided therein under which small producers rates allegedly are regulated on the purchaser facet of the transaction, *i.e.*, as costs paid by the purchasing pipeline. Part II deals with this aspect of Order No. 428, and shows that, notwithstanding the protestations in the Commission's brief, Order No. 428's "unreasonably high" standard for such costs is not the same or the equivalent of the statutory just and reasonable rate standard. Indeed, making the two standards as the same or full equivalents would frustrate the purpose of Order No. 428. It is only by allowing the two standards to be different would there be any basis for providing the alleged incentive to the small producers to expand their exploration and development activities.

As a result, as Part II further shows, Order No. 428's substitute regulatory scheme not only imposes an unwarranted and illegal regulatory burden upon such pipelines, but it does so under standards which, in addition to departing dramatically from the Act's just

and reasonable rate standard, reopens a regulatory gap of the type which Congress and this Court thought had been closed by the Natural Gas Act. Moreover, such shifting of the responsibility of guarding against excessive prices imposes unwarranted burdens upon the pipelines which are accentuated by Order No. 428's standards which are impermissably vague and fail to provide the pipelines with the guidelines necessary to enable them to ascertain, when they contract to purchase small producer gas, the "reasonableness" *vel non* of the prices they are agreeing to pay.

Finally, we show in Part III that the reasons advanced by the Commission in purported justification for Order No. 428 are unsound, invalid and unsupported by the record. While Tennessee is, of course, fully aware of the critical shortage of natural gas and entirely sympathetic with the Commission's efforts to alleviate that shortage, exempting small producers from direct rate regulation will not provide the stimulus urged by the Commission. Moreover, whatever benefits do result from such exemption will be far outweighed by the increased costs to the pipelines and the ultimate consumers.

ARGUMENT

I.

THE COMMISSION HAS EXCEEDED ITS AUTHORITY IN EXEMPTING SMALL PRODUCER SALES FROM THE DIRECT RATE REGULATION PRESCRIBED BY THE NATURAL GAS ACT

A. Order No. 428 Exempts Small Producer Sales from Direct Rate Regulation Under the Act

1. Order No. 428 Discards the Statutory Standard in Favor of Contract Negotiated Prices

Contrary to the Commission's present claim (*e.g.* Br. p. 13), there can be no question that both the intent and end result of Order No. 428 are to exempt the

rates charged by small producers for their sales of natural gas from compliance with the Act's just and reasonable rate standard. Order No. 428 provides—to quote the Commission (Br. p. 14)—for the issuance to small producers of "blanket certificates authorizing them to sell gas *at whatever contract rates they are able to negotiate.*" Specifically, as pointed out, *supra,* p. 4, the language of Order No. 428 is to the effect that upon receiving a blanket certificate from the Commission, small producers shall "be authorized to make small producer sales nationally *pursuant to existing and future contracts at the price specified in each such contract*" (J.A. 149).

In addition, as the Commission further recognizes Br. p. 27), Order No. 428 "also eliminates for the small producer the risk that they will be ordered to refund any collected rates that are later determined to be unreasonably high". Specifically, the language of Order No. 428 is to the effect that "[s]mall producers will have no refund obligations with respect to increased rates, if any, collected for sales regulated hereunder * * *" (J.A. 142; see also J.A. 143).

These exemptions, Order No. 428 goes on to state, are provided in order "to assure the small producer that when he enters into a new contract for the interstate sales of gas, the provisions of his contract will not be subject to change" (J.A. 137).[13]

Thus, under Order No. 428, the small producers were to have the right to charge and keep the contractually-negotiated prices without regard to the applicable area

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[13] This assurance that their prices would not be subject to change, which Order No. 428 was thus intended to provide the small producers, is at odds with assertions in the Commission's brief (*e.g.*, pp. 11, 25), that it intended in Order No. 428 to retain authority to reduce small producer rates prospectively.

or guideline prices prescribed by the Commission as just and reasonable for producer sales generally.[14] As the Commission further recognizes (Br. p. 27), its "plan" was to operate to "excuse small producers from the price restraints imposed upon large producers by the maximum area rate level." In other words, under Order No. 428 the prices charged and retained by small producers are governed not by the applicable "just and reasonable" ceiling prices, but rather by the price provided in the sales contracts with their purchasers.

Such Commission intention is also demonstrated by the inclusion of the so-called indirect regulatory scheme in Order No. 428. Prior to effectiveness of Order No. 428—when it was clear that the just and reasonable rate standard applied to sales by small producers—the Commission had no problem about permitting the pipelines to recover their full payments to such producers as part of their cost of service without further review. If, as the Commission now claims, rates charged by small producers were to remain subject to the Act's just and reasonable rate standard under Order No. 428, there would be no reason for including the so-called indirect regulatory scheme in Order No. 428. As noted by the Court below (Pet. App. 14a):

> "* * * It strains credulity to assert that the Commission meant to achieve just and reasonable rates through normal market forces, while in the very same Orders it refused to let pipelines and large producer plant operators pass on these 'just and reasonable' rates without further review under new non-statutory standards."

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[14] In contrast to pipelines, which have traditionally been regulated on an individual company cost-of-service basis, the Commission has been regulating rates for producer sales of gas on the basis of area or guideline rates. See *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

That Order No. 428 was intended to free the rates charged by small producers from the Act's just and reasonable rate standard is further indicated by the fact that freedom from these restraints obviously constituted the "carrot" which the Commission was holding out to the small producers in order to provide them with an additional incentive to explore for and develop new gas reserves. Small producers in many areas have already been freed from compliance with most of the Act's other requirements *including the need to obtain Commission permission before raising their prices up to the applicable just and reasonable area rate.* Order No. 308, 34 FPC 1202 (1965); Section 157.40 of the Commission Rules and Regulations under the Natural Gas Act; *Cf. Permian Basin Area Rate Cases, supra* at 784-787, see *infra* p. 23.

2. Order No. 428 Contains No Finding or Basis for Finding that Contract Prices Comply with the Statutory Standard

Not only does Order No. 428 not provide any ceiling upon the level of the contractually-negotiated prices which small producers would be permitted to charge and retain under Order No. 428, but it does not undertake to make any finding that such contractual prices would comply with the statutory "just and reasonable" rate standard. Nor could any such finding be validly made since Order No. 428 was issued without evidentiary hearing or record.

The rationale underlying Order No. 428 is that the statutory standard is inapplicable since the Commission has exercised its discretion to waive compliance —not that the various prices at which the small producers have now and will in the future contract to sell their gas comply with that standard. Since there is no inherent correlation, much less identity, between contractually-permissible prices and regulated just and

reasonable rates (*cf. F.P.C.* v. *Hope Natural Gas Co., supra* at 601), the Commission's *a priori* advance and sweeping acceptance of contractually negotiated prices as the prices which small producers would be permitted to charge and retain could not be based on an application of the statutory just and reasonable rate standard.

Indeed, it would have been impractical for the Commission even to attempt to make any such finding. Not only will the contract prices being sanctioned in Order No. 428 vary all over the lot but the statutory standard obviously assumes a determination based on a consideration of the surrounding circumstances in each instance and not a general *a priori* and *in vacuo* determination. *Cf.* Section 19(b) of the Natural Gas Act, 15 U.S.C. 717(b).

B. The Natural Gas Act Does Not Vest the Commission with Authority To Exempt Small Producers Generally from Direct Rate Regulation Under the Act

1. The Act's Rate Standard Applies to All Sales Including Those of Small Producers

The Commission's undertaking here to exempt small producers from direct regulation under the just and reasonable rate standard of the Natural Gas Act clearly constitutes effective abandonment by the Commission of the responsibility delegated to it by the Natural Gas Act. There is no question but that small producers are natural gas companies subject to the Commission jurisdiction as defined in Section 1(b) of the Natural Gas Act, *infra*, p. 1a.[15] Likewise, it is clear that the Commission's rate jurisdiction extends without exception to *all* wholesale sales of gas by such companies, and leaves no room for Commission exemption of any sales

[15] Section 1(c), added in 1954, 68 Stat. 36, 15 U.S.C. 717(c) contains a limited exception not here applicable.

from "the heart of the * * * regulatory system" (*F.P.C.* v. *Hope Natural Gas Co., supra* at 611) contained in the rate standard provided in Sections 4 and 5 of the Act, *infra,* pp. 1a-2a.

Thus, as held by this Court in *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U.S. 672 (1954), the Natural Gas Act vests in the *Commission* the responsibility and obligation for regulating directly the rates for "*all* wholesales of natural gas" regardless of the classification, producer or pipeline, large or small, of the seller (347 U.S. at 682):

> "* * * The legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of *all* wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company."

In that case, which involved the question of the Commission's jurisdiction over producer sales generally, this Court went on to say (*Id.* at 682-684):

> "There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business. [fn. omitted] * * * Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems."

In line with this all-inclusive jurisdiction over wholesale sales for resale by natural gas companies, the rate provisions of the Natural Gas Act are "flat, and unqualified" and "bristle with 'any'." *Cf. American*

Trucking Associations v. *F.C.C.*, 377 F.2d 121, 130 (D.C. Cir., 1966), *cert. denied,* 386 U.S. 943 (1967). Thus, Section 4(a) prescribes in pertinent part:

> "*All* rates and charges made * * * by *any* natural gas company * * * and *all* rules and regulations affecting or pertaining to such rates * * * shall be just and reasonable, and *any* such rate or charge that is not just and reasonable is hereby declared to be unlawful."

Section 4(b) directs that:

> "*No* natural-gas company shall, with respect to *any* transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant *any* undue preference or advantage to *any* person or subject *any* person to *any* undue prejudice or disadvantage, or (2) maintain *any* unreasonable difference in rates, charges, service, facilities, or in *any* other respect, either as between localities or as between classes of service."

Section 4(c) similarly requires that:

> "Under such rules and regulations as the Commission may prescribe, *every* natural-gas company shall file with the Commission, * * * schedules showing *all* rates and charges for *any* transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting *such* rates and charges, together with *all* contracts which in any manner affect or relate to *such* rates, charges, classifications, and services."

Likewise, Section 4(d) orders:

> "Unless the Commission otherwise orders, *no* change shall be made by *any* natural-gas company in *any* such rate, charge, classification, or service, or in *any* rule, regulations or contract relating thereto, except after thirty days' notice to the Commission and to the public. * * *"

Finally, Section 5(a), the other major rate provision of the Natural Gas Act, charges in like vein:

> "Whenever the Commission, after a hearing * * * shall find that *any* rate, charge, or classification demanded, observed, charged, or collected by *any* natural-gas company in connection with *any* transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that *any* rule, regulation, practice, or contract affecting *such* rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine *the* just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order * * *".

The Commission has long since recognized the unqualified scope of this Congressional mandate. In its Order No. 174-B in which it amended its then newly-issued regulations implementing this Court's 1954 *Phillips* decision that its jurisdiction extended to producers as well as pipelines, the Commission categorically concluded that "[t]he Act does not provide for exemptions from its requirements * * *" and accordingly rejected numerous requests that its producer regulations "be amended to relieve small producers from the requirements of the statute" (13 F.P.C. 1576, 1577 (1954)).

Likewise, the Commission uniformly held, also with uniform court approval, that the requirements of the Natural Gas Act were applicable to all producers, small and large alike. Thus, in *Saturn Oil & Gas Company, Inc.* v. *F.P.C.*, 250 F.2d 61 (10th Cir. 1957), *cert. denied* 355 U.S. 956 (1958), the Court of Appeals ruled (250 F.2d at 67):

> "* * * There is nothing in the Natural Gas Act which makes its applicability depend on the size

> or the integration of the gas operator. The Phillips decision holds that the Act applies to *all* wholesales by producers. Saturn may not escape regulation because of its size or because of the restricted nature of its operations."

See, also, *Deep South Oil Company of Texas* v. *F.P.C.*, 247 F.2d 882, 884, 887 (5th Cir. 1957) (holding sales of natural gas by "a small unintegrated corporation" to be subject to regulation under the Act); *cf. F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 216 (1964).

2. Section 16 Does Not Delegate Authority Direct to the Commission to Exempt Small Producers from Rate Regulation

In Order No. 428 the Commission claimed to find "room for administrative judgment and discretion", in Section 16 of the Act as well as in this Court's decisions in *Permian Basin Area Rates Cases, supra,* and *F.P.C.* v. *Hunt,* 376 U.S. 515 (1964), authorizing it to waive its admitted direct rate jurisdiction over small producers (J.A. 136). Likewise, in its brief here (at p. 22) the Commission asserts that this Court's decision in *F.P.C.* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972) provides it with the "necessary degree of flexibility" to make appropriate adjustments. But neither Section 16 nor any of the cases thus cited by the Commission provide it with the necessary authority or discretion to abandon the direct rate regulation of small producer sales prescribed by the Natural Gas Act.

Section 16, *infra,* pp. 2a-3a, does not vest authority or discretion in the Commission to ignore or even modify the clear mandate of Sections 4 and 5. However broad and sweeping may be the power given to the Commission by that Section to classify and prescribe different

requirements for different classes, it plainly was not intended to delegate to the Commission authority to revise or modify the coverage as explicitly prescribed by Congress in other provisions of the Act. As stated by the Court below with reference to Section 16 (Pet. App. 10a):

> "The Commission can only classify '[f]or the purposes of its rules and regulations.' It can only prescribe rules and regulations 'to carry out the provisions of this chapter.' Section 16 * * * does not give the Commission independent powers. Rather, it provides for implementation of the core sections of the Act, such as Section 4.' "

This Court has not given Section 16 any broader construction in *F.P.C.* v. *Louisiana Power & Light Co., supra.* The Court there first determined that Section 1(b) included authority for the Commission to control curtailments before it invoked Section 16 as a basis for its statement cited by the Commission (Br. p. 22) that the Commission must be free "* * * to make the pragmatic adjustments which may be called for by particular circumstances." 406 U.S. at 642. In this regard it should be noted that the Commission's excerpt from *Louisiana* omits the Court's limiting language, *i.e.,* that such freedom to make pragmatic adjustments exists only "within the ambit of [the Commission] statutory authority." Thus, the Court's holding in *Louisiana* patently is not as broad as now urged by the Commission.[16]

[16] Significantly, the quotation from *Louisiana* cited by the Commission, was taken by this Court from its earlier decision in *F.P.C.* v. *Natural Gas Pipeline Co. of America,* 315 U.S. 575 (1942), where it was used to describe the ambit of the Commission authority under the just and reasonable rate standard of the Act. See 315 U.S. at 586.

Likewise, while this Court in *Permian Basin Area Rate Cases, supra,* approved the Commission's actions in exempting small producers from certain requirements, such special treatment did not operate to exempt their sales from direct rate regulation under the Act. Instead, the exemption was very limited and extended only to

> "* * * two forms of special relief: first it released small producers from the requirement that quality adjustments be made in price; (fn. omitted) and second, it commenced a rulemaking proceeding intended to relieve them from various filing and reporting obligations. See 34 F.P.C. 434. The Commission asserted that the consequences for consumer prices of the first would be *de minimis;* it expected that the second would measurably reduce the small producers' regulatory expenses." (fn. omitted) (390 U.S. at 786).

Thus, under the special small producer provisions approved in *Permian Basin Area Rate Cases,* the sales by such producers still remained subject to direct regulation under the just and reasonable rate standard provided in Sections 4 and 5 and the small producers themselves had to bear the consequences of rates charged in excess thereof. In other words, as this Court there stated, "the exemptions created by the Commission for [small producers] are *fully consistent with the terms and purposes of its statutory responsibilities.*" (390 U.S. at 787).

Finally, the Commission's position is not advanced by *F.P.C.* v. *Hunt,* 376 U.S. 515 (1964) (J.A. 136, Comm. Br., p. 4). To be sure, Mr. Justice Clark there adverted to the Commission's then congested docket and suggested that (376 U.S. at 527):

> "* * * the techniques of the National Labor Relations Board might be studied with a view to de-

> termining whether its exemption practices, see *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 3-4 (1957) might be helpful in the solution of the Commission's problems."

However, not only is this suggestion pure dictum, but the statutory scheme under which the NLRB operates is vastly different in this critical respect from the Natural Gas Act. In contrast to the flat, unqualified mandate of the Natural Gas Act, the National Labor Relations Act vests the Board with broad discretion whether or not to exercise the jurisdiction vested in it. See, *e.g.* *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 13-14 (1957) (Mr. Justice Burton dissenting). Plainly, therefore, the exemption practice followed by the NLRB in exercise of its statutory discretion does not support the Federal Power Commission's exemption of small producers from rate regulation under the Natural Gas Act in the teeth of the all-inclusive Congressional mandate contained in Sections 4 and 5 of the Act.[17]

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[17] In light of this Court's stress in both *Permian* and *Hunt* as to the need for relief of the Commission's administrative difficulties, it should be noted that contemporaneously with the litigation in *Permian*, the Commission went ahead with the rule-making proceeding referred to this Court in *Permian* (390 U.S. at 786). As a result, and prior to, and independently of, Order No. 428, the Commission issued Order No. 308, 34 F.P.C. 1202 (1965), authorizing small producers, *inter alia*, (1) to make new sales of gas without seeking any additional certificate authorization under Section 7 of the Act, and (2) to increase their rates *up to the applicable area rate* for contractually authorized rate increases without filing notices of rate change under Section 4(d) of the Act. See *supra*, p. 15; *infra*, p. 53. And although this relief initially was limited to small producers in the Permian Basin, it was subsequently extended to include small producers in Southern Louisiana, Hugoton-Anadarko, Appalachian and Illinois Basins. See Section 157.40 of the Commission Rules and Regulations under the Natural Gas Act.

II.

THE SUBSTITUTE REGULATORY SCHEME IS UNLAWFUL AND INEFFECTUAL TO DISCHARGE THE COMMISSION'S RESPONSIBILITIES UNDER THE ACT

In support of its position, the Commission urges that the substitute regulatory scheme is an "innovative method of indirect regulation * * * which ensures * * * that small producers' rates meet the statutory standard" (Br. p. 13). In this regard, the Commission further asserts (Br. p. 20) that its substitute regulatory scheme "does not abandon the statutory 'just and reasonable standard' * * * Rather it * * * provides for a determination of the reasonableness of the rates based in part upon field prices and * * * ensures * * * that the ultimate consumer is fully protected against the effects of unreasonably high small producer rates. * * *"

We show below that, contrary to these assertions by the Commission, Order No. 428's standard for reviewing the pipeline payments for small producer gas is not the same as, nor the equivalent of, the Act's just and reasonable rate standard either theoretically or practically. As a result, the substitute regulatory scheme not only creates a gap in the comprehensive regulatory scheme intended by Congress, but it subjects the pipelines to unwarranted and illegal risks and burdens, accentuated by the vagueness and lack of clarity in the applicable standards set out in Order No. 428.[18]

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[18] In contrast to the characterization in the Commission's brief (*e.g.*, Br., p. 12) of its action in Order No. 428 as "experimental," there is nothing in that Order indicating that the actions there taken were in fact intended as experimental in any sense, least of all in the sense that these actions were intended to be of limited duration only. Any such limited time duration would be inconsistent with the customary practice in the industry under which gas sales contracts are usually for periods of 20 years or more. *Cf. United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 322 (1956).

A. Order No. 428's Standard for Allowance of Pipeline Payments for Small Producer Gas Is Not the Equivalent of the Statutory Just and Reasonable Rate Standard

In urging that the Order No. 428's standard is the equivalent of the statutory just and reasonable standard, the Commission in its brief before this Court has had (1) to edit the language of Order No. 428; (2) to interpret the language in that order in a new and novel manner; (3) to ignore the historical gloss upon the statutory just and reasonable standard; and (4) to ignore the entire intent and purpose of Order No. 428.

1. "Unreasonably High" Is Not the Complete Standard for Allowance of Pipeline Costs Set Out in Order No. 428

The Commission's initial argument in this regard is that the standard provided in Order No. 428 for passing on pipeline payments for gas purchased for small producers is that such costs not be "unreasonably high". Thus, the Commission asserts (Br. pp. 14-15):

> "The pipelines and large producers are permitted under the order to seek rate increases 'tracking' the small producers' rate increases. The tracking increases, like the small producers' rates, may be collected without refund obligation, but only to the extent that the small producers' rates —*i.e.,* the pipeline's purchased gas costs—are not themselves 'unreasonably high' (App. 140, 142) (footnote omitted). A tracking increase which is based on 'unreasonably high' small producer rates may be suspended by the Commission and is subject to reduction and refund (App. 142, 143)."

But these references to "unreasonably high" are not complete—a fact that is plain on the face of Order No. 428. Thus, with reference to large producer rate in-

creases reflecting gas purchases from small producers, Order No. 428 explicitly provides (J.A. 140):

> "* * * These filings shall be accepted, without refund obligation, as long as the price differential is consistent with prevailing price differentials in the area and as long as the small producer prices for new gas are not unreasonably high, *considering appropriate comparisons with highest contract prices for by large producers or the prevailing market price for intrastate sales in the same producing area.*"

And with reference to comparable pipeline rate increases, Order No. 428 similarly provides (J.A. 142):

> "* * * The pipeline's rates will be subject to reduction and refund, with respect to new small producer sales, but only as to that part of the rate which is *unreasonably high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market price for intrastate sales in the same producing area.*"

Plainly, a standard excluding costs which are "unreasonably high" is far different from one excluding costs which are "unreasonably high *considering appropriate comparisons with highest contract prices for sales by large producers on the prevailing market price for intrastate sales in the same producing area.*" By limiting its quotation of the standard for allowance of pipeline costs to "unreasonably high", the Commission would create a misleading impression as to the actual standard provided in Order No. 428.

2. Order No. 428 Contemplates That the Allowance of Pipeline Payments for Small Producer Gas Be Based Solely upon the Two Market Criteria Set Out in That Order

The Commission further contends (Br. p. 16) that the Court of Appeals erred in "read[ing] the Commission's order as tying the reasonableness determination *exclusively* to the two market factors" set out in Order No. 428 (emphasis in original). According to the Commission Br. p. 17):

> "* * * the order does not imply that the two stated factors are the *only* ones that may be considered. To the contrary, the standard is one of reasonableness, and the order specifies that in applying that standard '[t]he Commission shall consider *all relevant factors*' (App. 142; emphasis added). The two unregulated market price considerations are among those 'relevant factors' that the Commission will take into account. They were separately identified in the order, not because they were intended to have necessarily controlling importance, but because the Commission wished to signal a departure from its traditional practice of subordinating field prices to other factors in fixing area rates."

In addition to the fact just demonstrated, *i.e.,* that Order No. 428's standard is not "one of reasonableness" *per se,* the above Commission contention is at odds with the plain language of Order No. 428 which clearly and unequivocally sets forth the two market criteria as the primary, if not, the exclusive criteria to be applied in passing on pipeline payments for small producer gas. Thus not only does the excerpt from Order No. 428 last reproduced above indicate that a pipeline's liability to disallowance would be limited to that portion of its costs for small producer gas which are "unreasonably high considering appropriate compari-

sons" with the two market factors, but the Order No. 428 goes on immediately to characterize these factors specifically as "the standard set forth above" (J.A. 142):

> "Tracking increases to the extent they reflect small producer prices for new sales *above the standard set forth above* may be suspended * * *."

Plainly, therefore, the standard provided in Order No. 428 for reviewing pipeline costs for small producer gas is not "one of reasonableness" in the abstract or without a frame of reference as the Commission appears to urge,[19] but rather one of not "unreasonably high" vis-a-vis the two market criteria specifically enumerated by the Commission. Hence, while Order No. 428 does go on to state, as the Commission further urges, that "[t]he Commission shall consider all relevant factors" (J.A. 143), this statement does not, the Commission also urges, serve to detract from the importance of the two market criteria. Rather, all it means is that the Commission would consider all "relevant" factors—whatever that means (see, *infra*, pp. 40-41)—in applying these two criteria.[20]

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[19] "Reasonableness" standing alone, obviously has no meaning and requires a concrete set of circumstances or frame of reference before it can have any substance or meaningful context.

[20] In this regard, it should be also noted that the reasons now asserted by the Commission for "separately identifying" the two market criteria in Order No. 428 find no support in the Commission Orders here involved. Rather, they consist of a *post hoc* rationalization by counsel which, under established principles, can not be accepted in support of the validity of Order No. 428. *Cf. Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 401, 419 (1971); *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 168-169 (1962).

3. Utilization of Market Criteria Constitutes Departure from Traditional Just and Reasonable Rate Standard

In any case, whether the standard for allowing pipeline costs for gas purchased from small purchasers is to be based exclusively or only partially upon the two market criteria, utilization of such market criteria in passing on the reasonableness of rates—assuming that they were to be so used—clearly would constitute an abandonment of the just and reasonable standard of the Act, the Commission's claims to the contrary notwithstanding (Br. p. 13). As the Commission appears to admit (Br. pp. 17-18), such market criteria have not in the past, and are not now, utilized in determining the just and reasonable rates for producers generally.

Thus, as this Court noted in *Permian Basin Area Rate Cases, supra,* in affirming the Commission's refusal there to derive "area rate * * * from field or contract prices" (390 U.S. at pp. 792-795):

> "* * * The record before the Commission * * * supports its conclusion that competition cannot be expected to reduce field prices in the Permian Basin to the 'lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' *Atlantic Rfg. Co.* v. *Public Service Comm'n,* 360 U.S. 378, 388.
>
> "The field price of natural gas produced in the Permian Basin has in recent years steadily and significantly increased (footnote omitted). These increases are in part the products of a relatively inelastic supply and steeply rising demand; but they are also symptomatic of the deficiencies of the market mechanism in the Permian Basin. * * *
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> * * * * * * * * *
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> "These market imperfections, operative despite an 'essentially monopsonistic environment,' have accentuated the consequences of inelastic supply

> and sharply rising demand. (footnote omitted) Once an increase has been obtained by the larger producers, the escalation clauses have guaranteed similar increases to others. (footnote omitted). In contrast, consumers have been left without effective protection against steadily rising prices. Their alternative sources of energy are in practice few, and the demand for natural gas, particularly in California, is therefore relatively unresponsive to price increases. (footnote omitted) The consumer is thus obliged to rely upon the Commission to provide 'a complete, permanent and effective bond of protection from excessive rates and charges.' *Atlantic Rfg. Co.* v. *Public Service Comm'n, supra,* at 388."

To be sure, this Court in *Permian* then went on to note that it was not precluding the consideration of field prices for all time and that "the record in subsequent area proceedings may more clearly establish that the market mechanism will adequately protect consumers interests." (390 U.S. at 795.) However, this reservation does not, as the Commission implies (Br. p. 17), help the Commission's position here. Not only was Order No. 428 issued without an evidentiary hearing, and hence there was no record of any substance made, but, as noted *supra,* pp. 15-16, the Commission in Order No. 428 did not purport to determine that the contractually-permissible rates at which a small producers could sell their gas under Order No. 428 would in fact comply with the just and reasonable standard prescribed in Sections 4 and 5.

4. Sellers' Market Makes It Unrealistic To Impose Regulatory Responsibility upon Pipelines

Despite the clear discrepancy between statutory standard and those of Order No. 428, the Commission nevertheless persists in urging that the Order No. 428 standards are the "full equivalent of the statutory 'just and reasonable' standard" (Br. p. 16), in that "the ultimate consumer is fully protected against the effects of unreasonably high small producer rates" (Br. p. 18). This argument is based on the claim that the substitute regulatory scheme operates to provide the pipelines with "a strong incentive to negotiate for producer rates that are sufficiently low to permit them to track the rates without refund obligations" (Comm. Br. p. 20, see also Comm. Br. pp. 15, 24).

In addition to the objections to the substitute regulatory scheme discussed elsewhere in this brief, there should be noted in this connection that since the acute shortage of natural gas has created a strong sellers' market, there is sharp competition among potential purchasers for any new gas which might become available. The pipelines are encountering serious problems in their efforts to purchase enough gas to take care of the needs and requirements of their customers. As the Commission itself urges (Br. p. 5), the existing critical shortage of natural gas "has seriously affected the ability of the Nation's major pipelines to meet the demands of their interstate markets. At the current time, 26 curtailment proceedings * * * have been initiated before the Commission." In these circumstances it is unrealistic and unfair to impose upon the purchasing pipelines the additional responsibility of keeping small producer rates from increasing unduly at the risk of having to absorb the costs subsequently determined by the Commission to be excessive.

5. Full Equivalence between the Statutory Standard and Order No. 428 Would Frustrate the Purpose of That Order

As noted earlier herein, Order No. 428 is presumably directed at stimulating greater exploration and development activities by small producers with the "carrot" being that they be permitted to charge and retain contractually-permissible prices in excess and without regard to of the applicable just and reasonable area rates. Accordingly, the less the spread between contractually-permissible prices and the applicable just and reasonable rates, the less would be the incentive provided to the small producer and the more such "incentive" might turn out to be inadequate. On the other hand, the greater the spread between the contractually-permissible prices and the just and reasonable rates, the greater the incentive provided to the small producers. One of the fatal flaws of Order No. 428 is that it does not indicate how great a spread is needed in order to provide an "adequate" incentive. Instead, it places no ceiling upon small producer prices and leaves it up to the purchasing pipelines, subject to the risk of disallowance, to determine the level which the Commission will subsequently determine to be appropriate.

If, as the Commission now urges, the Order No. 428 standard is in fact the same as, or a full equivalent to, the Act's statutory just and reasonable standard such equivalence would in large measure frustrate the purpose of Order No. 428. If, under No. 428, the Commission were to disallow all costs incurred by a pipeline in excess of a just and reasonable rate for small producer gas there would be few, if any, pipelines, which would be willing, or could afford, to contract to pay higher prices for such small producer gas. In other words, the price paid by the pipeline to the small

producer will tend to approximate the level which the Commission would sanction as costs to the pipelines, and therefore, full equivalence between the just and reasonable standard and the Order No. 428 standard would result in little, if any, price differential to the small producers.

Indeed, if there were in fact a full equivalence between the Order No. 428 standard and the statutory just and reasonable rate standard, there would be no purpose at all for Order No. 428 and its substitute regulatory scheme. In such circumstances, the Commission would achieve the same result without abandoning direct regulation of small producer rates. The Commission issued Order No. 428 only because it recognized and intended that there be a substantial spread between Order No. 428 standard and the statutory just and reasonable rate standard. Thus, among the flaws inherent in Order No. 428 are (1) that it allows for a spread between the Act's just and reasonable rate standard and the price received by the small producer and (2) that it provides no measure of the magnitude of this spread.

B. The Commission's Indirect Regulatory Scheme Creates a Gap in the Comprehensive Regulatory Scheme Intended by Congress

In further support of its substitute regulatory scheme, the Commission also contends (Br. p. 21) that "[t]here is nothing in the Act that requires the Commission to regulate producers' rates directly or to employ *any* particular regulatory method." (Emphasis in original.) While the Commission then goes on to cite Section 16 and quote from a number of decisions of this Court (Br. pp. 21-23), all of these decisions relate to the choice of method in connection with direct

regulation of the natural gas companies involved. None of them even suggest that the Commission has any choice but to regulate all producers sales *directly*. See *supra*, pp. 16-20. To the contrary, both the Act and its history belie the Commission's claim.

Thus, by designating the Commission as the agency responsible for the administration of the Natural Gas Act, Congress left no doubt of its intention directly to charge that agency with the responsibility of fixing the level of rates at which natural gas is to be sold for resale in interstate commerce. Moreover, as indicated *supra*, p. 16, Section 1(b) defines the Commission's jurisdiction as extending not only "to the transportation of natural gas in interstate commerce [and] to the sale in interstate commerce of natural gas for resale * * *," but also "to natural-gas companies engaged in such transportation or sale." Furthermore, as also noted *supra*, p. 18, Section 4(a) applies to "all rates and charges *made, demanded, or received by any natural-gas company* for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission * * *," and Section 5(a) is cast in terms of "any rate * * * *demanded* * * *, *charged or collected by any natural-gas company* in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission * * *."

In addition to these express manifestations of a Congressional intent to prescribe direct regulation for all natural gas companies subject to the Act, it is also clear that both Congress and this Court have regarded indirect regulation such as that purportedly provided in Order No. 428 not to be an effective or meaningful substitute for direct regulation, but rather as consti-

tuting a regulatory gap which can be closed only by direct regulation. Thus, had Congress shared the Commission present views that such indirect regulation was in fact an effective alternative to direct regulation, there would have been no occasion to enact the Natural Gas Act or Federal Power Act; there would have been no "gap" disclosed by the *Attleboro* case (*Public Utilities Commission* v. *Attleboro Steam and Electric Co.,* 273 U.S. 83 (1926) since the local regulatory agencies clearly had the authority to disallow the costs reflecting excessive payments made by the local utilities subject to their jurisdiction.

Similarly, had this Court shared these Commission views, there would have been no occasion for it to rule in *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U.S. 672 (1954) that independent producers were subject to direct regulation under the Natural Gas Act, since the Commission already had the authority to disallow the costs reflecting excessive payments for gas made by the pipeline companies to such producers. Indeed, one of the effects of Order No. 428 is to reopen for small producers the regulatory gap which this Court thought was closed for all producers by its decision in the *Phillips* case.

Patently, therefore, neither Congress nor this Court have regarded the indirect regulation such as that purportedly provided in Order No. 428 as an adequate substitute for direct regulation. To the contrary, in enacting the Natural Gas Act with the Federal Power Commission charged with its administration, Congress intended that all sales which it provided be subject to regulation under the Act be required to meet the standards provided by the Act, and that the Commission be *the* body directly responsible for achieving that

result. The Commission's attempt in Order No. 428 to shift these responsibilities, therefore, is contrary to both the Congressional intent in enacting the Natural Gas Act and this Court's understanding in deciding the *Phillips* case.

C. The Substitute Regulatory Scheme Imposes Unwarranted Burdens Upon the Pipelines Coupled with Impermissibly Vague Standards

1. Order No. 428 Imposes New Responsibilities and Risks upon the Pipelines

The substitute regulatory scheme violates the Natural Gas Act in still another way. By shifting to the pipelines the responsibility of not paying excessive prices to small producers at the risk of having to absorb any such excess also flaunts the Congressional intent as clearly manifested in the Natural Gas Act.

Under the scheme of direct rate regulation of small producers sales in effect since at least this Court's decision in the *Phillips* case, it was the Commission's responsibility directly to regulate such producer rates and the risks with regard to excessive rates were borne by the producer selling the gas, not by the pipeline purchasers of the gas. This was so even though the price charged the pipeline by the producer was authorized by the producer's contract with the pipeline. As a result, a pipeline purchasing gas from a producer, small or large, had no responsibility with regard to the reasonableness of such producer's rates and incurred no risk from a regulatory point of view, whatever the rate provided in the contract. If such contract rate was found to be excessive, not only was the producer prohibited from thereafter charging that rate, but the pipeline could even receive a refund of the excessive portion of any such rate already paid.

Order No. 428 with its substitute regulatory scheme would subject the pipelines to responsibilities and risks they did not previously have. No longer would they have the security resulting from the fact that small producers were prohibited from charging rates in excess of the applicable area or guideline price. Instead, the pipelines now would have the responsibility of making sure that the prices which they were paying the small producers met the Commission's purported criteria. In other words, under the Commission's proposed substitute regulatory scheme, each pipeline purchasing gas from a small producer would be subject to the new risks that if upon *post facto* "second guessing," the Commission later determined that such payments were excessive, the amount of the excessive payments would be excluded from the pipeline's cost of service for rate making purposes, and hence would have to be absorbed by the company instead of passed on in the company's rates to its customers.[21]

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[21] The impropriety of such shifting of responsibility is accentuated by Order 428's further provision permitting pipelines to file rate increases to track the increased costs for small producer gas only if that increased cost (combined with other increases authorized for tracking by unspecified Commission orders) "affect the pipeline's average cost of purchased gas one mill or more" (J. A. 143). This means, for example, that before Tennessee could "track" the increased costs resulting from the Commission's exemption of small producers, Tennessee will have to absorb all such cost increases until their accumulated total, either alone or together with other increases authorized for tracking, reached approximately $1,200,000 in annual gas purchase costs. The unreasonableness of this requirement is further compounded by the fact that small producer increases would not become effective all at once, but rather in dribs and dabs over a period of time. In the meantime under this limitation, the pipeline would have to absorb the entire increased cost.

2. Pipeline Risks under Order No. 428 Are Different From, and Broader Than, under the Standards Applicable to the Disallowance of Costs Generally

The Commission seeks to minimize the impact upon the pipelines of this shift in regulatory responsibilities by urging (Br. pp. 32-33) that the pipelines traditionally have been borne the risk of disallowance of excessive operating costs. But such risk of disallowance relates to materials and service purchased by the company in connection with its operations, the prices for which are generally governed wholly by market factors and are *not* subject to regulation. Moreover, and more important, under the applicable standards the risks of disallowance was very limited and actual disallowance very infrequent. See *e.g. State of Missouri ex rel Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U.S. 276, (1923); *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U.S. 63, 72 (1935).

For example, in the *Southwestern Bell* case, this Court set aside the disallowance of alleged excessive expenses, stating (262 U.S. at 288-289):

> "* * * There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in States Public Utilities Commission ex rel. Springfield v. Springfield Gas & Electric Co., 291 Ill. 209, 234, 125 N. E. 891, 901:
>
> 'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors

of the corporation; nor can it ignore items, charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers.' "

Likewise, in the *West Ohio* case, this Court, in setting aside a comparable disallowance by a state Commission, commented (294 U.S. at 72):

> "Good faith is to be presumed as the part of the managers of a business. [Citations omitted] In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as a measure of a prudent outlay [Citations omitted]."

Order No. 428's criteria for disallowance are patently far different and broader than those applicable to the disallowance of costs generally. Order No. 428 does not provide for recognition of managerial good faith or prudence. Nor does it provide for deference to managerial discretion and judgment. Instead, as is next discussed, it undertakes to prescribe a set of far broader criteria which suffer from the additional and fatal infirmity of being impermissably vague.

3. Order No. 428's Standards Are Vague and Fail To Provide the Pipelines with the Requisite Guidelines

As noted earlier, Order No. 428 provides for disallowance of "that part of the rate which is unreasonably high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market prices for intrastate sales in the same producing area" (J.A. 142). These "standards" are vague in that they fail to provide the pipeline with the clear guidelines which they need in negotiating the price and other terms of their purchase agreements with small producers.

If, as the Court of Appeals held, the two market criteria are to be controlling, then there is substantial ambiguity—since there are two criteria listed—whether both are to be taken into account in making the determination or only one. The ambiguity in this regard is accentuated by the use of the disjunctive "or." Suppose, for example, that "the highest contract prices for sales by large producers" are found to be different —higher or lower—from "the prevailing market prices for intrastate sales in the same producing area." Is one to be controlling and if so, which one? If neither is controlling and both are to be taken into account, what is the weight to be given each?

Turning now to the "standards" themselves, what is meant by "the highest contract prices for sales by large producers?" Does the phrase "sales by large producers" include intrastate sales as well as interstate sales? Nonjurisdictional direct sales as well as jurisdictional sales for resale? Short term sales as well as long-term sales? Does the phrase "the highest contract prices" include the highest contract prices even if not paid or the highest contract prices actually paid? Does the phrase include more than one highest contract price, and if so, how are they to be used in making the "appropriate comparisons?" Suppose that the highest prices in a producing area turn out to be 26¢ and 30¢ per Mcf. Which price, if either, would be controlling? And how would the "appropriate comparisons" be made in these circumstances?

The second "standard," *i.e.*, "the prevailing market price for intrastate sales in the same producing area," similarly suffers from vagueness. What is meant by "prevailing market price?" Does it mean the current price at which new contracts are being executed or

the prices currently being paid under existing contracts? As to the "market price," which price does it refer to if there are a number of sales at different prices. The highest, the lowest, the median, the average, weighted or unweighted?[22] Finally, what does "same producing area" include, the field from which the gas is produced or an area such as that used by the Commission in determining area prices or something in between?

The ambiguities in this regard would be even greater under the Commission's present reading of Order No. 428, *i.e.*, that the market criteria were only two of the "relevant" factors which the Commission would consider in passing upon a pipeline's costs for small producer gas. This reading gives rise to the additional questions as to what are the additional "relevant" factors, and to what are they to be "relevant"? Relevant to the "market criteria"? Relevant to the small producers' "costs"? Or relevant to the amount of additional gas made available by small producers as a result of Order No. 428? Are such "relevant factors" the means by which the Commission intends to ascertain the "spread" needed to provide the "incentive" sought to be provided by Order No. 428? Finally, there is the question as to the comparative weight to be given to these additional "relevant factors" as against the market factors specifically referred to by the Commission.

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[22] Assuming, of course, that such information would be available to a pipeline at the time is negotiating a gas purchase contract with a small producer.

4. The Commission's Defenses of Order No. 428 Standards Are Without Merit

The Commission contends that the standards are not impermissibly vague because, according to the Commission (Br. p. 33):

> "* * * reasonableness is the statutory standard governing all rate matters under the Natural Gas Act. Companies that are subject to the Commission's jurisdiction can hardly claim unfamiliarity with the standard; the pipelines' rate base has always been limited to reasonable costs."

This argument reflects the Commission's continued confusion of two separate and distinct facets of a sales transaction.[23] On the one hand, there is the sale aspect—"the statutory standard governing all rate matters under the Natural Gas Act" relates to rates charged for sales made by natural gas companies. For pipelines, such rates are determined on a cost-of-service basis, while for producers, area rates are used. On the other hand, there is the purchase aspect—the "reasonable costs" which pipelines have been allowed to recover as part of their "rate base" have usually been determined under the "imprudence" standard of the *Southwestern Bell Telephone* case, *supra.* In other words, contrary to assumption implicit in the above assertion of the Commission, the criterion for determining the validity of rates is very different from that for determining allowable costs even though both may be stated in terms of reasonableness.

But even more important than the fact that the Commission's statement thus confuses two different

[23] Neither these nor the further factors referred to in the Commission Brief (at pp. 33-34) are relied on in the Orders here under review and hence constitute *post hoc* rationalizations which cannot be accepted as support for Order No. 428. See *supra*, p. 28, fn. 20.

standards is the fact that Order No. 428 does not undertake to adopt either of them. As shown *supra,* pp. 32-33, application of the just and reasonable rate standard would frustrate the entire purpose and intent of the Order No. 428. Also, as shown *supra,* pp. 38-39, Order No. 428 standards are far broader, and appears to assume more extensive disallowances, than the *Southwestern Bell Telephone* "imprudence" standard.

As further support for its position, the Commission also urges (Br. pp. 33-34) that the two market factors

> "* * * together with the currently effective area ceiling rates, any ongoing large producer rate proceedings, and the traditional elements of a small producers' rate base—will permit a gas purchaser to estimate with confidence the limits of a reasonable small producer rate."

In addition to the vagueness of the two market factors already discussed, *supra,* pp. 38-41 it should be noted that this further suggestion again confuses the different standard applicable to rates charged for sales by a natural gas company, on the one hand, and that applicable to the allowance of costs incurred in purchases by such a company, on the other. Thus both "the currently effective area ceiling rates" and "any ongoing large producer rate proceedings" are determined under the statute's just and reasonable rate standard. As pointed out earlier, Order No. 428 not only abandons that standard as applied to the sales by small producers but does not seek to carry it over to purchases by pipelines.

As to "the traditional elements of a small producers' rate base" (Br. p. 34), this, too, would be determined under the Act's just and reasonable rate standard and hence likewise would be inapplicable here—assuming,

of course, that there would be any such traditional "rate base" for small producers. The fact is that there is no such thing as "the traditional elements of a small producers' rate base." The Commission early recognized the infeasibility of regulating the rates charged by producers, small or large, on the basis of the individual company's cost of service. See *Permian Basin Area Rate Cases, supra* at 747-758. Instead since at least 1961 when it issued its Statement of General Policy 61-1, 28 Fed. Reg. 947 (1961) the Commission abandoned individual company costs as the basis for regulating producer rates and instead has been using rates based upon *composite* cost data. See *Permian Basin Area Rate Cases, supra* at 758-764; *Wisconsin* v. *Phillips Petroleum Co.,* 373 U.S. 294 (1963).

In sum, in addition to their other infirmities, *supra*, p. 28, fn. 20, the various factors advanced by the Commission in its brief fall far short of providing the pipelines with the guidelines to which they are undoubtedly entitled so that they can "estimate with confidence" (Comm. Br., p. 34) the price they can pay for small producer gas free from the risk of disallowance. While the pipelines do not have a "risk-free guarantee * * * that they will be able to pass on to consumers all the costs they incur, however unreasonable, those costs may be" (Comm. Br. p. 34), they are entitled to guidelines which are sufficiently clear to enable them to determine whether or not the costs for small producer gas being incurred by them are "unreasonably high * * *." The criteria provided in this regard in Order No. 428 fall far short of providing such guidance.

III.

THE REASONS ADVANCED BY THE COMMISSION IN PURPORTED JUSTIFICATION OF ORDER NO. 428 ARE UNSOUND, INVALID, AND UNSUPPORTED BY THE RECORD

Even assuming *arguendo* that the Commission has the authority in appropriate circumstances to shift from direct to indirect rate regulation of small producers as provided in Order No. 428, Order No. 428 would nevertheless be unlawful because the reasons here advanced in purported jurtification of these actions are unsound, invalid, and unsupported by the record. In this regard, it should be noted that despite the obvious importance and impact of Order No. 428, that Order was issued without the benefit of an evidentiary hearing and solely on the basis of written comments and a single informal conference of relatively brief duration.

As noted in the Statement, *supra*, p. 4, (see also Comm. Br. pp. 23-24), the Commission issued Order No. 428 as part of its program directed at alleviating the present acute shortage of natural gas. According to Order No. 428 (J.A. 137), the proposed exemption "should encourage small producers to increase their exploratory efforts which are so important to the discovery of new sources of gas," thereby constituting "an important step forward" in the meeting of the "Commission responsibilit[y] under the Natural Gas Act * * * to assure maintenance of an adequate gas supply for the interstate market." (See, also, Comm. Br., pp. 23-25).

Tennessee, of course, is fully aware of the intensifying shortage of natural gas and is entirely sympathetic with the Commission's efforts to provide the stimuli needed to encourage the requisite exploration for and

development of the needed gas reserves. However, as shown below, far from making more gas available for the interstate markets, exempting small producers from direct rate regulation generally under the Natural Gas Act will more probably have the opposite effect. Moreover, whatever stimulus the exemption might provide to small producers to engage in additional exploration and production activities, would be at a cost to the ultimate consumers grossly disproportionate to the benefits resulting therefrom. Finally, exempting small producers from direct rate regulation is not justified as a means of relieving either the Commission or small producers of the administrative burdens of regulation.

In this regard there should be noted the restraint in the Commission's statement in its brief before the Court of Appeals (at pp. 20-21), as compared to Order No. 428 and its position before this Court (Br. pp. 23-27) that:

> "* * * The Commission's action does represent a progressive step forward in meeting the gas supply problem—a step that *should* enable jurisdictional purchasers to more effectively compete with intrastate buyers for available gas owned by small producers. In any event, it *should* encourage small producers to search for and produce more gas, thereby making additional gas available to the intrastate market (fn. omitted) * * *."

A. The Exemption Will Probably Depress, Rather Than Stimulate, Exploration and Development by Small Producers

Inasmuch as the Commission is already engaged in providing incentives to producers generally, small as well as large, as part of its broad scale efforts to stimulate them to increase their exploratory efforts, the Commission's issuance of Order No. 428 necessarily as-

sumes that the small producers need the *additional* incentives over and above those provided to producers generally, in order to stimulate the small producer exploratory efforts to the appropriate level. But, there are no findings in the Order No. 428 and no basis in the record made in connection with that Order—other than possibly the self-serving and untested conclusory assertions by small producers—to support that assumption.

For example, there is nothing in the record to indicate the small producers' reaction to the incentives already provided to producers generally. Nor is there anything in the record to indicate how many of the thousands of small producers which would be exempted from direct rate regulation under Order No. 428 have historically engaged in exploratory or developmental drilling programs or how many would initiate drilling programs in response to the additional incentives which the Commission was seeking to provide through Order No. 428. Thus, for all that appears on the record, many thousands of small producers may not engage in any new drilling programs and yet will receive the benefits of the exemption provided in Order No. 428 at the expense of the pipelines and consumers. The Commission's failure to address itself to these critical questions destroys whatever validity its action might otherwise have.

Indeed, far from stimulating substantial additional drilling activities on the part of small producers, exempting such producers from direct rate regulation under the Natural Gas Act would in all probability, have a contrary effect. Inasmuch as the exemption will apply only to the first 10,000,000 Mcf of the annual volumes sold by a small producer, this limitation imposes a ceiling upon the volumes of gas which such producers

would be willing to sell on the interstate markets. Obviously, if a producer's sales are already at or near the 10,000,000 Mcf per year level, the exemption would provide him with no incentive at all.

The exemption device will thus provide an incentive, if at all, for small producers to engage in exploratory activities and sell additional gas on the interstate markets *only if* their sales are well below 10,000,000 Mcf per year and then *only to the extent* that the new sales do not increase their total sales above the 10,000,000 Mcf per year level. As that ceiling is approached, the incentive, if any, will be either not to undertake further exploration or development or to sell gas on the intrastate markets in order to obtain the unregulated price which the Commission assumes producers require in order to undertake an exploratory drilling program.

Significantly, the record contains no breakdown of small producers in accordance with the level of their annual sales either generally or vis-a-vis their past exploration and development activities. Instead, it assumes that all "small producers" are equally able to undertake expanded exploration and development activities and that all will respond equally to the incentive being offered. Common sense indicates, however, that the smaller the "small producer" the less able is he financially to undertake extensive exploration and gathering activities. It is the larger "small producers" who are in the better financial position to react to the Commission's incentive. Yet, it is precisely these larger "small producers" who are the most likely to be caught by the 10,000,000 Mcf level and hence are the ones to whom Order No. 428 offers the least incentive.

In these circumstances, the Commission's claim (Br. p. 11) that "[s]mall producers [are] traditionally responsible for 80 percent of natural gas exploration"

has no meaningful significance.[24] Not only does the 80 percent figure refer back to a time when the level of a producer's sales was immaterial from a regulatory point of view but it casts no light on the level of sales made by producers who were engaged in exploration and development.

The proposed exemption would have a depressant effect upon the availability of new gas for the interstate markets in still another way. Order No. 428 provides that (J. A. 140):

> "* * * The royalty interests stand in the same shoes as the working interest owners. Consequently, if a royalty interest relates to a small producer sale, such interest shall be exempt, but if it applies to any other sale it will not be exempt."

Since the effect of this provision is that the royalty payments by small producers would be based in the "market value" nonregulated price whereas royalty payments by large producers would be based on the lower regulated price, a landowner would obviously prefer to lease his potential gas-producing properties to small producers, with the results just discussed.

B. The Cost Increases to Pipelines and Ultimate Consumers Are Grossly Disproportionate to the Benefits

As already indicated, the small producer exemption from rate regulation applies to *all* those qualifying as "small producers" whether or not they engage in exploration and development activities as a result of the exemption provided in Order No. 428. Thus, Order No.

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[24] The 80 percent figure thus invoked by the Commission has no basis either in Order No. 428 itself or in the limited record made in connection with the issuance of that Order.

428 inevitably operates to permit increased costs to the pipelines and ultimate consumers wholly without regard to any increased exploration and production activities undertaken by the small producers.

Order No. 428 further operates to increase the costs to the pipeline and the ultimate consumers without regard to increased exploration and production activities by including *existing* small producer contracts within the exemption. This means, for example, that a small producer who is selling at or near the 10,000,000 Mcf per year ceiling, will be entitled to the benefits of the exemption with respect to his *existing* contracts even though, as noted earlier, the exemption itself would provide him with little, if any, incentive to explore for, and produce, more gas for the interstate markets.

These additional costs would be in addition to those which would result under Order No. 428 to the extent that the incentive offered by that Order in fact operates to induce such small producers to make more gas available to the interstate market. To the extent that the exemption stimulates exploratory activity by small producers and such activity results in an increase in the volume of gas available to the interstate market by such producers, it would increase the volume of gas produced by small producers generally and to this extent undercut the Commission's second reason for exempting them from rate regulation under the Act, namely, that such exemption would not have a significant impact upon the costs incurred by the purchasing pipelines and passed on in the rates paid by the ultimate consumer (J. A. 137).

In this regard, it should be noted that the Commission's claim (J. A. 137; Br. p. 24) that small producers

accounted for 10.5 percent of gas purchases by 96 pipelines in 1969 has no support in the record.[25] More importantly, the Commission's present attempt to treat the impact of its proposed exemption of small producers from Commission regulation as *de minimis* is at odds with its earlier determination on a full hearing record in the *Permian Basin Area Rate Cases, supra*. In there denying comparable requests that small producers should be exempted from area rate ceilings, the Commission emphatically stated (34 F.P.C. at 235):

> "A basic consideration in reaching our conclusion in this matter is that the impact of small producer prices on consumers is by no means *de minimis* on an area basis, and is of great impact in some situations. Sales by small producers constitute 80 percent of the gas supply of one pipeline (fn. omitted) and range from 9 percent to about 60 percent of the supply of the other 25 largest pipelines. While small producers represent only 15 percent of the aggregate interstate gas supply it is obvious that they are a substantial factor in the cost of the gas supply of millions of American consumers."

In the same vein, the Commission further observed in *Permian* (*Ibid.*):

> "Another consideration which weighs with us is that penetration of rate ceilings even on a small scale could be seriously disruptive of a pattern of uniform area ceilings."

Apart from these inconsistencies in the Commission's position in *Permian* and here, it is readily de-

[25] Although such statistical computation purports to be based on 1969 data submitted to the Commission by the pipelines, the statistics and computations based thereon are not a part of the record and have not otherwise been made available.

monstrable that the Commission's present computations operate grossly to understate the impact of the proposed exemption even assuming *arguendo* that the computations are themselves arithmetically correct. Not only does the use of averages serve to conceal the magnitude of small producer sales to a number of pipelines (see *Permian Basin Area Rate Case, supra,* at 235), but the statistics used by the Commission admittedly "do not include resales to pipelines by large producers of gas purchased from small producers." (J. A. 137, fn. 1). Yet Order No. 428 explicitly includes such resales within the proposed exemption, and the transcript of the informal conference held indicates that the volumes involved may well be very substantial.

For example, while he could not quantify the volume purchased from small producers, counsel for Phillips Petroleum Company, one of the largest producers, indicated at that conference that between 40 and 50 percent of its total jurisdictional sales represented purchases from other producers (including small producers) (J. A. 113). Counsel for Signal Oil and Gas Company similarly stated that Signal has:

> "* * * very, very little production of [its] own. Almost 100% is purchased from other producers * * * * * * It looks to us like between 60 and 70 percent of the gas that we sell presently comes from small producers." (J. A. 131).

Since Phillips and Signal are but two of the large producers, it is apparent that the volumes of gas now being sold which would come within the exemption would be substantially greater than indicated by the statistics relied on by the Commission.[26]

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[26] The nature of the underlying rulemaking proceeding and the lack of an evidentiary record makes it impossible to ascertain the full thrust of the proposed exemption.

In any case, even as adjusted to include such large producer resales, the Commission's statistics would still fall short of reflecting the true impact of the exemption. This is so because (1) the statistics used relate to a period when the proposed exemption was unavailable, and (2) the very purpose of the proposed exemption is to encourage increased exploration, and thereby, to increase the production and sale of gas by small producers in the interstate markets. To the extent that this purpose is achieved and brings about the sought-after increase in small producer sales, the result would be in increased impact upon the pipelines and their ultimate consumers. Plainly, therefore, the statistics relied on by the Commission greatly understate the impact of the proposed exemption upon the pipelines and their ultimate consumer.

C. Order No. 428 Is Unnecessary To Reduce the Administrative Burdens Upon the Small Producers and the Commission

As a further reason for issuing Order No. 428, the Commission has urged that the exemption would "relieve the small producer of the expenses and burdens relating to regulatory matters" (J. A. 137). But this argument loses its force in light of the fact pointed out, *supra*, p. 23, fn. 17, that by Order No. 308, issued in 1965 and thereafter extended, the Commission has already relieved the small producers in the Permian Basin, Southern Louisiana and certain areas from the need to file certificate and rate applications as long as the rates charged do not exceed the applicable area rates. Extension of this provision to the remaining producing areas would be sufficient to relieve the small producers of most of the expenses and administrative burdens relating to regulation. Plainly, therefore, it is unnecessary also to exempt small producers from direct

rate regulation in order to minimize the administrative burdens of regulation upon such producers.

Likewise without merit is the Commission's related reason, *i.e.,* that the exemption would ease its "administrative burdens connected with processing small producer filings" (J. A. 137). The reduction in small producer filings provided in Order No. 308, would also serve to reduce the Commission's administrative burden vis-a-vis small producers to a minimum without the further step of exempting such producers from direct rate regulation under the Act.

Indeed, exempting small producers from direct rate regulation as well as from filing requirements generally would increase, rather than reduce further, the Commission's administrative burdens vis-a-vis small producers. Under Order No. 428, the Commission not only will have to receive for filing and processing each small producer's contracts and amendments thereto, albeit as filed by the pipelines and large producers, but it will also have the administrative problems of collecting the relevant materials and reviewing the multiplicity of prices at which the small producers would be selling to the pipelines and large producers the gas produced by them under varying circumstances from a variety of fields.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should affirm the judgment of the Court of Appeals setting aside the Commission Order No. 428 here under review.

Respectfully submitted,

MELVIN RICHTER
LITTMAN, RICHTER, WRIGHT & TALISMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorney for Respondent Tennessee Gas Pipeline Company, A Division of Tenneco, Inc.

L. F. CADENHEAD
P. O. Box 2511
Houston, Texas 77001

Of Counsel

January, 1974